104

(7)

No. 07-1523

FILED
AUG 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DERRICK TODD LEE,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. WARD, Jr.
District Attorney
ANTONIO M. "TONY" CLAYTON *
Chief Felony Prosecutor
ELIZABETH A. ENGOLIO
Assistant District Attorney
EIGHTEENTH JUDICIAL DISTRICT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA
Post Office Drawer 880
Plaquemine, Louisiana 70765
(225) 687-5210

* Counsel of Record

Counsel for the State of Louisiana

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	2
I. WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS IN NON-CAPITAL FELONY CASES?	2
II. WHETHER DNA EVIDENCE INTRODUCED AT PETITIONER'S TRIAL WAS PROPERLY ADMITTED PURSUANT TO THE INEVITABLE DISCOVERY DOCTRINE?	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Apodaca v. Oregon, 406 U.S. 404 (1972)	*passim*
Apprendi v. New Jersey, 530 U.S. 466 (2000)	6, 7, 8
Blakely v. Washington, 542 U.S. 296 (2004)	8
Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970)	3
Hohn v. U.S., 524 U.S. 236 (1998)	3
Johnson v. Louisiana, 406 U.S. 356 (1972)	*passim*
Nix v. Williams, 467 U.S. 431 (1984)	12
Patterson v. McClean Credit Union, 491 U.S. 164 (1989)	3
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)	3
Runyon v. McCrary, 427 U.S. 160 (1976)	3
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	3
State v. Bowen, 215 Or. App. 199, 168 P.3d 1208 (2007)	8
State v. Caples, 938 So.2d 147 (La. App. 1 Cir. 2006), *writ denied*, 955 So.2d 684 (La. 2007)	9
State v. Divers, 889 So.2d 335 (La.App. 2 Cir. 11/23/04)	5
State v. Jones, 381 So.2d 416 (La. 1980)	5
State v. Lee, 964 So.2d 967 (La.App. 1 Cir. 5/16/07)	2
State v. Lee, 976 So.2d 109 (La. 1/16/08)	9, 12
State v. Lee, 977 So.2d 896 (La. 3/7/08)	2
State v. Simmons, 414 So.2d 705 (1982)	5
State Oil Co. v. Khan, 522 U.S. 3 (1997)	3
Williams v. Florida, 399 U.S. 78 (1970)	7, 8

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

	Page
La. Const. of 1974 Art. I, §17	4
U.S. Const. amend. VI	*passim*
U.S. Const. amend. XIV	6, 8

CODE ARTICLES

LA C.Cr.P. Art. 782	4

OTHER AUTHORITIES

Hamilton, A., *The Federalist, No. 78*, (H. Lodge ed. 1888)	3
Blackstone, William, Commentaries on the Laws of England (1769)	7

IN THE

Supreme Court of the United States

No. 07-1523

DERRICK TODD LEE,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Geralyn Desoto met her killer, the petitioner, Derrick Todd Lee, at the door of her mobile home in the Parish of West Baton Rouge, Louisiana on January 14, 2002. After Lee convinced her to let him use her telephone, he forced his way in and brutally beat her in the face and head. Though Desoto struggled, she was stabbed into submission and was ultimately killed by Lee when he slashed her throat open. Lee left his footprint in blood on Desoto's chest, indicating he also stomped on her before he left.

DNA collected from the scene conclusively linked Lee to Desoto's murder as well as the murders of sev-

eral other women in South Louisiana from 1992 to 2003.

Lee was indicted by a West Baton Rouge Parish Grand Jury with First Degree Murder and was tried for Second Degree Murder, a violation of LA R.S. 14:30.1, of which he was found guilty.

The Louisiana Court of Appeal, First Circuit affirmed the conviction and sentence obtained in the Eighteenth Judicial District Court of Louisiana;[1] the Louisiana Supreme Court denied writs.[2]

ARGUMENT

I. WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS IN NON-CAPITAL FELONY CASES?

Prior to 1972, the number of jurors required for a conviction was shaped by tradition. With *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), Louisiana was permitted to allow convictions supported by less than unanimous juries in non-capital felony cases. The principle of stare decisis, therefore, cannot be ignored as is suggested by the petitioner. Though the issue presented requires constitutional analysis, the jurisprudence established must not be disturbed without special justification, which the State of Louisiana asserts does not exist.

This doctrine is essential as it promotes even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity

---

[1] *State v. Lee*, 964 So.2d 967 (La.App. 1 Cir. 5/16/07)

[2] *State v. Lee*, 977 So.2d 896 (La. 3/7/08)

of the judicial process. *Hohn v. U.S.*, 524 U.S. 236 (1998); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

"It is indisputable that stare decisis is a basic self-governing principle with the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) citing *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970) and The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). Without a development in the law that undermines precedent, being proven to be impractical or becoming inconsistent with the sense of justice or the social welfare, stare decisis prohibits the petitioner's proposition. *Patterson*, *supra* citing *Runyon v. McCrary*, 427 U.S. 160 (1976).

Neither petitioner nor any of his amici satisfy any of the considerations which would trigger the overruling of *Apodaca* or *Johnson* set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Louisiana has for some time employed the states' right to obtain a conviction by non-unanimous jury

verdict via its constitution, La. Const. of 1974 Art. I, §17, which provides in pertinent part:

> §17. Jury Trial in Criminal Cases; Joinder of Felonies; Mode of Trial
>
> Section 17.(A) Jury Trial in Criminal Cases. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. *A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.* A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.
>
> (emphasis added)

Pursuant thereto, the Louisiana Code of Criminal Procedure holds:

> Art. 782. Number of jurors composing jury; number which must concur; waiver
>
> A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. *Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render*

> *a verdict*. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.
>
> B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.
>
> (emphasis added)

Accordingly, in *State v. Jones*, 381 So.2d 416, 418 (La. 1980), the Louisiana Supreme Court held that a non-unanimous verdict in a twelve person jury did not violate the Sixth and Fourteenth Amendments of the U.S. Constitution. In *State v. Simmons,* 414 So.2d 705 (1982), relying on United States Supreme Court jurisprudence, the Louisiana Supreme Court held that the non-unanimous verdict authorized by LSA-C.Cr.P. Art. 782 did not violate a defendant's federal constitutional rights under the Fifth and Fourteenth Amendments. *Simmons*, 414 So.2d at 707. In *State v. Divers*, 889 So.2d 335, 353 (La.App. 2 Cir. 11/23/04), the Louisiana Second Circuit Court of Appeal held that non-unanimous jury verdicts for twelve-individual juries are not unconstitutional.

It is evident that *Apodaca* and *Johnson* have been relied upon by Louisiana Courts and therefore, to force unanimous jury verdicts upon the states would be to impose gratuitous hardship and inequity upon them. While a requirement of unanimity does not materially contribute to the exercise of commonsense judgment,[3] it would create an impediment to justice which is neither called for by the constitution nor logic. Moreover, the *Apodaca / Johnson* rule has become so

---

[3] *Apodaca, supra* at 410.

embedded, so accepted, so fundamental an expectation that a change would result in actual dislocations to the states in their application of the Sixth Amendment.

Petitioner's suggestion that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny so undermine *Apodaca* and *Johnson* that their principles are no longer recognizable as sound law, if ever they were, is wholly unsupported. Likewise, petitioner claims that recent decisions regarding the Sixth Amendment's Confrontation Clause, right to counsel, and right to compulsory process and their import to the states through the Fourteenth Amendment create the same expectation of jury verdict unanimity; however, this is not necessarily so. Jury unanimity is distinct from the aforementioned Sixth Amendment rights cited by petitioner, in that, it is nowhere enunciated in the Sixth Amendment. Petitioner's approach to jury unanimity makes an assumption that is not required by the Sixth Amendment.

Furthermore, the position taken by petitioner and its amici, that circumstances have so changed, or come to be seen so differently, as to have stripped *Apodaca* and *Johnson* of their justification, is not compelling in light of the deliberate examination of the Sixth Amendment rights by the *Apodaca/Johnson Court*. The evolution of understanding of the consequence of non-unanimous jury verdicts submitted by the opposition fails to dissolve the reasoning set out in *Apodaca*. The current rule observes that it is neither necessary nor possible to have every distinct voice in the community represented on every jury and to prevent conviction of a defendant in any

case; albeit, that voice has a right to sit on the jury.[4] Additionally, it cannot be assumed that minorities are unable to adequately represent their viewpoints or that the majority will necessarily refuse to weigh the evidence and reach a rational decision.

Petitioner makes much of the recent quotations of William Blackstone[5] by this Court in the line of cases following *Apprendi*; however, the notion that the framers incorporated every common-law feature of the jury into the Sixth Amendment was rejected by the Court in *Williams v. Florida*, 399 U.S. 78, 99 (1970). "[T]here is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* The Court has focused instead on "the function that the particular feature performs and its relation to the purposes of that jury trial." *Id.* At 99-100. In *Williams*, the Court rejected the argument that the Sixth Amendment protected a right to a twelve-person jury, even though the history established that it was a common practice very familiar to the framers of the constitution. "To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions." *Id.* at 102-03.

It follows then, that the use of Blackstone's remarks on the "unanimous suffrage of twelve of [the defendant's] equals and neighbours" has no more effect

---

[4] *Apodaca*, *supra* at 413.

[5] *Commentaries on the Laws of England* (1769)

on *Apodaca* and *Johnson* than it did on *Williams*. Further, if the Court's citation of Blackstone in recent Sixth Amendment analyses was intended to be so controlling as insisted by petitioner, then six person juries, which have also been found to be within the Sixth Amendment, are also vulnerable.

If the *Blakely*[6] Court had intended to overrule what a majority of the Court had held in *Apodaca* and *Johnson* (*i.e.*, a state criminal defendant may be constitutionally convicted by a less-than-unanimous jury), it surely would have done something more than simply quote Blackstone to wipe from the books all that was said in those two decisions about the unanimity rule and the requirements of the Sixth and Fourteenth Amendments. That the Court mentioned neither *Apodaca* nor *Johnson* in *Blakely* is strong indication that it had no intention to overrule those decisions in the course of requiring jury trials for certain sentencing decisions.

Indeed, the Oregon and Louisiana state courts have correctly rejected arguments similar to the one petitioner makes here, concluding that *Apprendi* and *Blakely* do not address the issue of the constitutionality of a non-unanimous jury verdict and, therefore, they do not purport to overrule *Apodaca* or *Johnson*. *See, e.g., State v. Bowen*, 215 Or. App. 199, 202, 168 P.3d 1208, 1209 (2007) ("Nothing in *Blakely* purports to overrule *Apodaca*; indeed, *Blakely* does not include any reference to *Apodaca*. Rather, . . . jury unanimity—or the lack thereof—was immaterial to the analysis in *Blakely*, and its antecedent, *Apprendi* . . ., which both addressed the constitutionally prescribed role of the jury, as opposed to the court, in determin-

---

[6] *Blakely v. Washington*, 542 U.S. 296 (2004)

ing facts material to the imposition of criminal sentences."); *State v. Caples*, 938 So.2d 147, 157 (La. App. 1 Cir. 2006), *writ denied*, 955 So.2d 684 (La. 2007) (similarly rejecting challenge to Louisiana's constitutional and statutory provisions permitting less-than-unanimous-jury verdicts in criminal cases). Petitioner offers no good reason for this court to reach a different conclusion.

No circumstance or rationale has been presented which would warrant overturning *Apodaca* and *Johnson*, precedent which has been relied upon for thirty-six years. Consequently, Louisiana law allowing non-unanimous jury verdicts in non-capital felony cases should not be disturbed.

II. WHETHER DNA EVIDENCE INTRODUCED AT PETITIONER'S TRIAL WAS PROPERLY ADMITTED PURSUANT TO THE INEVITABLE DISCOVERY DOCTRINE?

Although the Louisiana Court of Appeal found the collection of Lee's DNA to be constitutional, the Supreme Court of Louisiana held in *State v. Lee*, 976 So.2d 109 (La. 1/16/08), in its review of the Nineteenth Judicial District Court conviction of Lee for the murder of Charlotte Murray Pace, that although the subpoena duces tecum issued by the Twentieth Judicial District of Louisiana to collect a buccal swab of Lee did not meet constitutional requirements for a search, the evidence was admissible pursuant to the inevitable discovery rule.

Lee was first swabbed to obtain his DNA reference by Danny Mixon on May 5, 2003 for an ongoing investigation in East Baton Rouge Parish. Judge G. H. Ware, Jr., Twentieth Judicial District Court, signed

an order entitled "subpoena duces tecum" to obtain Lee's DNA.

The following facts were presented to the Twentieth Judicial District Court to obtain the first DNA sample from Lee in connection with the murders of Connie Warner and Randi Mebruer. Lee was arrested as a Peeping Tom in Oak Shadows Subdivision where both the Warner and Mebruer victims resided. Mebruer disappeared April 18-19, 1998. Lee was interviewed by Zachary Police Officers the day after the disappearance but officers were asked to leave by Lee. A subsequent interview with Lee confirms that the night of Randi Mebruer's disappearance, Lee was out at the Hideaway Lounge in Alsen, Louisiana. He left the lounge and drove to his girlfriend's house. The alleged route taken placed Lee within two (2) blocks of the entrance to Mebruer's subdivision where she was abducted. On file with the Louisiana Department of Public Safety and Corrections exposes a two-pronged history. First, Derrick Todd Lee has a history of predatory and violent arrests for home invasion, peeping tom, stalking, aggravated battery, aggravated flight and attempted first degree murder of a police officer. Lee was convicted for a 1988 attempted unauthorized entry of an inhabited dwelling, a 1992 simple burglary of an inhabited dwelling (this home invasion occurred near Oak Shadows Subdivision, where Mebruer resided at the time of her abduction), a 1995 peeping tom, two (2) 1997 peeping tom incidents (the original arrest was for six (6) counts of trespassing), two (2) counts of peeping tom and resisting arrest, a 1999 stalking (the original arrest was for stalking and peeping tom), and a 2000 aggravated flight. Second, Derrick Todd Lee's criminal history corroborates he was not incarcerated during the murders of Connie Warner, Randi Mebruer or

any other female victim linked to the "serial killer" through DNA analysis.

Thereafter, the defendant was linked via DNA evidence to several murders in South Louisiana, including the Geralyn DeSoto case.

After a hearing on the motion to suppress the DNA evidence obtained via the East Baton Rouge Parish subpoena duces tecum, the trial court ruled that Lee's DNA sample was legally obtained without infringement of his constitutional rights. Hence, the subsequent DNA sample obtained via the West Baton Rouge Motion to Compel was constitutional.

The State argued before the trial court that constitutional safeguards were observed when ordering Lee to submit to the swabbing and maintains that position; however, in light of the Supreme Court of Louisiana's decision to abrogate the lower court's ruling and subsequent application of the inevitable discovery rule in the Nineteenth Judicial District Court's companion case, we, agree that a DNA sample would have inevitably been procured considering the intense investigation which was narrowing to Lee as the serial killer.

Before Lee was approached for a DNA sample, it had been confirmed that several of the Baton Rouge and the Lafayette, Louisiana murders were at the hands of one man. Soon, the investigation opened to races other than Caucasian men. An attempted murder victim from the Parish of St. Martin, Louisiana, D.A., was linked through a partial DNA profile to the other known victims. Lee's only living victim had provided a sketch of him, which produced fruitful tips to the Serial Killer Task Force pointing to Lee. D.A. was also able to identify Lee in a photographic line-up.

Convictions should not be set aside due to a constitutional violation during collection of evidence when the evidence would have been ultimately or inevitably discovered. *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, this Honorable Court held that although the defendant's statement providing the location of his victim's body was obtained in violation of the defendant's right to counsel, the search group would have ultimately or inevitably discovered the victim. Therefore, the evidence was deemed admissible as evidence of the location and condition of the body.

The Serial Killer Task Force had already processed 18,000 leads and was investigating Lee prior to the positive DNA test results. Lee would not have escaped law enforcement without an alibi or exclusion by DNA which would have been obtained by consent or other less intrusive means. *State v. Lee*, 976 So.2d 109 at 129 (La. 1/16/08).

Therefore, no societal interest would be served by excluding this evidence; undoubtedly, the probative evidence of Lee's DNA, which was markedly at each crime scene, was properly presented to the jury. That is, the purpose of the exclusionary rule would not be satisfied by the reversal of this conviction in light of the inevitable discovery of the DNA evidence. *Nix*, *supra*.

Thus, this assignment of error should be found to lack merit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari on behalf of Derrick Todd Lee should be denied.

Respectfully submitted,

RICHARD J. WARD, Jr.
District Attorney
ANTONIO M. "TONY" CLAYTON *
Chief Felony Prosecutor
ELIZABETH A. ENGOLIO
Assistant District Attorney
EIGHTEENTH JUDICIAL DISTRICT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA
Post Office Drawer 880
Plaquemine, Louisiana 70765
(225) 687-5210

* Counsel of Record

Counsel for the State of Louisiana

August 6, 2008